Filed 11/20/08 In re A.B. CA2/3

NOT TO BE PUBLISHED IN THE OFFICIAL REPORTS

IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA

SECOND APPELLATE DISTRICT

DIVISION THREE

In re A.B., a Person Coming Under the Juvenile Court Law. _____ THE PEOPLE, Plaintiff and Respondent, v. A.B., Defendant and Appellant.	B202673 (Los Angeles County Super. Ct. No. TJ15491)

APPEAL from an order continuing wardship of the Superior Court of Los Angeles County, Catherine J. Pratt, Juvenile Court Referee. Affirmed.

Kiana Sloan-Hillier, under appointment by the Court of Appeal, for Defendant and Appellant.

Edmund G. Brown, Jr., Attorney General, Dane R. Gillette, Chief Assistant Attorney General, Pamela C. Hamanaka, Assistant Attorney General, Keith H. Borjon and A. Scott Hayward, Deputy Attorneys General, for Plaintiff and Respondent.

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Appellant, A.B., a minor, appeals from the order continuing wardship (Welf. & Inst. Code, § 602) entered following a violation of probation (Welf. & Inst. Code, § 777, subd. (a)) previously granted upon his admission that he committed the offense of unauthorized driving or taking of a vehicle (Veh. Code, § 10851, subd. (a)). The court ordered appellant placed in camp.

FACTUAL SUMMARY

The record reflects that on December 18, 2006, appellant committed the above offense of unauthorized driving or taking of a vehicle in Los Angeles County.

CONTENTION

Appellant claims the trial court's finding that he violated probation must be reversed because the trial court violated appellant's federal due process right to confrontation by admitting hearsay into evidence.

DISCUSSION

The Court Properly Admitted Reliable Hearsay Into Evidence.

1. *Pertinent Facts.*

On August 8, 2007, the court filed a Welfare and Institutions Code section 777, subdivision (a) notice of violation (hereafter, notice) and probation report. The document was submitted on August 8, 2007, by Los Angeles County Deputy Probation Officer Yvonne Higgins, and was read and approved on that date by Los Angeles County Senior Deputy Probation Officer Shelia Kittling. The report reflected appellant was 17 years old.

a. *The Welfare and Institutions Code Section 777 Notice and Attachments.*

(1) *The Notice's Allegations as to Counts 1 through 3.*

(a) *Count 1.*

The notice alleged three counts with the following pertinent allegations. Count 1 alleged that appellant's probation conditions 1 and 2 were that he obey all laws and

orders of the court and probation officer.[1] The count then alleged as follows. Appellant had participated in illegal activities. On July 16, 2007, the probation department was notified by the school that on June 8, 2007, appellant brought to school a marijuana pipe filled with marijuana, and also brought rolling papers and a lighter.

(b) *Count 2.*

Count 2 alleged that appellant's probation condition 9 was that he attend school, and maintain satisfactory grades and attendance. The count then alleged as follows. On or about May 22, 2007, appellant was enrolled at Sea Compton school. He was dropped from the program on his first day as a result of his failure to follow instructions. He left school with another student without permission and his whereabouts were unknown. On June 26, 2007, appellant left class without permission, entered another classroom, and took speakers from the computer on a teacher's desk. Appellant left the room and used the speakers to play loud music to disrupt class. As of July 16, 2007, appellant had been absent 14 out of 29 school days. He received D's in English and physical education, and F's in social studies, computer, math, and science.

(c) *Count 3.*

Count 3 alleged that appellant's probation condition 21 was that he not use or possess narcotics. The count then alleged that appellant had tested positive for marijuana on May 23, June 18, and July 18, 2007.

(2) *The Notice's Attachments.*

The notice contained attachments as indicated below.

(a) *Attachment as to Count 1.*

One attachment was relevant to count 1. It was a copy of a Soledad Enrichment Action S.E.A. Charter School Behavior Report pertaining to appellant, bore the logo of the Soledad Enrichment Action Education Centers, and pertained to the North Long Beach school site. Helen Soward, a teacher's assistant, signed the report on June 8, 2007.

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[1] There is no dispute that appellant was on probation when he committed the offense of unauthorized taking of a vehicle, and that his probation conditions included those alleged in counts 1 through 3.

The report reflects as follows. Appellant engaged in a first violation involving contraband. On June 8, 2007, appellant brought to school a marijuana pipe filled with marijuana, and also brought rolling papers and a lighter. Soward stated, "It was retrieved during our search of all students prior to entering the classrooms." Soward recommended a parent conference and that the probation officer be notified.

(b) *Attachments as to Count 2.*

Three attachments were relevant to count 2. One was a copy of a Soledad Enrichment Action S.E.A. Charter School Behavior Report pertaining to appellant, bore the logo of the Soledad Enrichment Action Education Centers, and pertained to the North Long Beach school site. Mr. Lucas, a teacher, signed the report on June 26, 2007.

The report reflects as follows. Appellant engaged in second and third violations. On June 26, 2007, appellant left class without permission, entered Lucas's classroom, and took speakers for Lucas's computer off Lucas's desk. Appellant left the room with the speakers and used them to play loud music to disrupt his class. Lucas recommended a parent conference and a final contract.

Another relevant attachment was a copy of appellant's progress report card dated June 24 or June 29, 2007, for the period May 30, 2007, through September 17, 2007. The card bore the logo of the Soledad Enrichment Action Education Centers, and pertained to the North Long Beach school site. The card was signed by Ms. Guzman, appellant's teacher, on June 24 or June 29, 2007. The card reflected appellant received D's in English and physical education, and F's in social studies, computer literacy, math, and science.

The third relevant attachment was a tally chart pertaining to appellant's school attendance starting on March 24, 2007. The attachment stated, "[appellant] has been here 29 days and has been absent 14 days since he started attending our school."[2] The attachment appears to have been faxed on July 25, 2007.

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[2] The chart also states, "One problem with [appellant] is that most of the days he attends school he arrives late."

b. *The Hearing*.

At the August 28, 2007 hearing on the notice, Higgins testified she had been employed as a probation officer for nine years. She was familiar with appellant and prepared the notice. She testified as follows.

(1) *Higgins's Testimony.*

(a) *Count 1*.

As to count 1, Higgins spoke with Mrs. Sauers[3] at the school regarding the marijuana pipe, rolling papers, and lighter. Sauers told Higgins that "this" was retrieved during a search of the students before they entered the classroom.

The prosecutor asked Higgins whether Sauers herself retrieved the item from appellant, and whether Sauers had stated this. Higgins testified that Higgins did not remember, then said, "Let me see if she actually stated she retrieved those items. I believe she did." Higgins needed a moment to review her report. Higgins, her memory refreshed by the report, testified that Sauers indicated she retrieved those items during a search of appellant.

(b) *Count 2.*

As to count 2, appellant arrived at Compton S.E.A. school on May 22, 2007. Higgins spoke with a Y.S.S. worker, Mr. Logan. Logan told Higgins that appellant was dropped from the program on the first day of school because he left the school campus without permission.

Higgins was aware of other instances in which appellant left class without permission. Her memory refreshed by her report, Higgins testified that on June 26, 2007, Lucas reported to Higgins that appellant left the classroom without permission. He entered another classroom and took speakers that belonged to Lucas's computer. Appellant went outside and, using the speakers, played music and disrupted class.

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3 We note Soward and Sauers are similarly pronounced, which suggests they may have been the same person. Whether they were or not does not affect our analysis.

Higgins had appellant's grades, and she asked permission to refresh her memory. Later, she testified as follows. Higgins was aware of appellant's grades at school. She was informed that appellant received D's in English and physical education, and F's in social studies, computer literacy, math, and science.

Higgins was also aware of appellant's absences from school. She had been informed that appellant had been enrolled in school for 29 days and had been absent 14 days.

(c) *Count 3.*

As to count 3, Higgins had an opportunity to test appellant for drugs. He tested positive for marijuana on May 23, June 18, and July 18, 2007. During cross-examination, the following occurred. Higgins denied she was present during "any of these incidents at school." Appellant asked whether Higgins personally tested appellant for drugs, and Higgins testified a male probation officer went in and watched appellant provide the testing sample, and she did not test the sample.

(2) *The Court's Findings.*

Following the presentation of evidence, the People asked the court to sustain the notice as to counts 1 through 3 based on the testimony. Appellant submitted on the issue of whether he had violated probation.

The court found true count 1 based on the facts that (1) on June 8, 2007, appellant brought to school a marijuana pipe, rolling papers, and a lighter, and (2) on May 23, June 18, and July 18, 2007, appellant tested positive for marijuana.

The court found true count 2 based on the facts that (1) on May 22 and June 26, 2007, appellant left class without permission, (2) as of July 16, 2007, appellant had been absent from school 14 days out of 29 school days, and (3) "his grades were D's and F's. None of them were passing grades." As to appellant's absence from school, appellant's counsel noted that, although it was not "particularly vital" to the court's ruling, an attachment to the notice indicated he was absent 14 days and present 29 days. The court reviewed the document and agreed with appellant's counsel, and the court corrected its finding accordingly. The court found true count 3 based on the facts that appellant tested

positive for marijuana on May 23, June 18, and July 18, 2007. The court sustained the notice.

2. *Analysis.*

a. *The Court Did Not Violate Appellant's Right to Due Process.*

Appellant claims the trial court violated appellant's federal due process right to confrontation by admitting hearsay into evidence. We disagree.

At a hearing on a Welfare and Institutions Code section 777, subdivision (a)(2) notice, "The court may admit and consider reliable hearsay evidence at the hearing to the same extent that such evidence would be admissible in an adult probation revocation hearing, pursuant to the decision in *People v. Brown*, 215 Cal.App.3d (1989) and any other relevant provision of law." (Welf. & Inst. Code, § 777, subd. (c).)[4]

In *People v. Brown*, *supra*, 215 Cal.App.3d 452, the appellate court stated, "'[T]he revocation of parole is not part of a criminal prosecution and thus the full panoply of rights due a defendant in such a proceeding does not apply to parole revocations.' [Citation.] Despite the relaxed rules of evidence governing probation revocation proceedings, a court is not permitted '"to admit unsubstantiated or unreliable evidence as substantive evidence . . . ."' (*People v. Maki* (1985) 39 Cal.3d 707, 715 . . . .) [¶] As long as hearsay testimony bears a substantial degree of trustworthiness it may legitimately be used at a probation revocation proceeding. [Citations.] In general, the court will find hearsay evidence trustworthy when there are sufficient 'indicia of reliability.' [Citation.] Such a determination rests within the discretion of the trial court and will not be disturbed on appeal absent an abuse of discretion. (*Ibid.*)" (*Id.* at pp. 454-455.)

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4 California Rules of Court, rule 5.580(e), provides, "(e) Evidence considered[.] The court must consider the report prepared by the probation officer and other relevant and material evidence offered by the parties to the proceeding. [¶] (1) The court may admit and consider reliable hearsay evidence as defined by section 777(c)."

(1) *Count 1*.

We have recited the pertinent facts. The court found true count 1, that appellant failed to obey all laws and orders of the court and probation officer, based in part on appellant's June 8, 2007 possession of marijuana and related paraphernalia. Higgins's testimony, fairly read, was that Sauers told her about the possession. We assume Sauers's statements were hearsay.

Nonetheless, even if Sauers's statements were hearsay, they were substantiated by Soward's signed report which was an attachment to the notice. There was no dispute below, and there is no real dispute here, as to the authenticity of that report or the accuracy of Soward's statements in it. We have no doubt the report would have been admissible under the business records hearsay exception of Evidence Code section 1271 and/or the official records hearsay exception of Evidence Code section 1280.[5]

The court also found true count 1 based on the fact that, on May 23, June 18, and July 18, 2007, appellant tested positive for marijuana. Higgins testified she had an opportunity to test appellant for drugs, and he tested positive on those dates. During cross-examination, however, Higgins denied she was present at any incident at school, testified a male probation officer went in and watched appellant provide the testing sample, and testified she did not test the sample.

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[5] Evidence Code section 1271 states, "Evidence of a writing made as a record of an act, condition, or event is not made inadmissible by the hearsay rule when offered to prove the act, condition, or event if: [¶] (a) The writing was made in the regular course of a business; [¶] (b) The writing was made at or near the time of the act, condition, or event; [¶] (c) The custodian or other qualified witness testifies to its identity and the mode of its preparation; and [¶] (d) The sources of information and method and time of preparation were such as to indicate its trustworthiness."

Evidence Code section 1280 states, "Evidence of a writing made as a record of an act, condition, or event is not made inadmissible by the hearsay rule when offered in any civil or criminal proceeding to prove the act, condition, or event if all of the following applies: [¶] (a) The writing was made by and within the scope of duty of a public employee. [¶] (b) The writing was made at or near the time of the act, condition, or event. [¶] (c) The sources of information and method and time of preparation were such as to indicate its trustworthiness."

Apart from whether Higgins had personal knowledge of the matters to which she testified on this issue, she did not testify as to statements made to her. Since she did not testify as to statements made to her, she did not testify as to hearsay. (Cf. *Browne v. Turner Construction Co*. (2005) 127 Cal.App.4th 1334, 1348-1349; Evid. Code, § 1200, subd. (a).)[6]

(2) *Count 2.*

The court found true count 2, that appellant failed to attend school, and maintain satisfactory grades and attendance, based in part on the fact that, on May 22, 2007, appellant left class without permission. Higgins's testimony, fairly read, was that Logan told her that on that date appellant left class without permission. The attachments did not refer to appellant leaving class on that date, but Higgins's testimony indicated that Logan, a Y.S.S. worker, told Higgins about this information first-hand, that is, Higgins did not relate multiple hearsay.

The court found true count 2, based in part on the additional fact that, on June 26, 2007, appellant left class without permission. Higgins testified that Lucas told her about this incident. We assume Lucas's statements were hearsay.

Nonetheless, they were substantiated by Lucas's signed report which was an attachment to the notice. There was and is no real dispute as to the authenticity of that report or the accuracy of Lucas's statements in it, which were admissible hearsay under the business records and/or official records hearsay exceptions. (The reliability of Lucas's statements in his report also enhances the reliability of Logan's statements that appellant left class on May 22, 2007.)

The court found true count 2 based in part on the further fact that, as of July 16, 2007, appellant was absent from school 14 days and present 29 days. Higgins's

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6 Even if the trial court erred by admitting into evidence this testimony from Higgins, we conclude the trial court would have found appellant in violation of probation based on the other violations discussed herein; therefore, no reversible error occurred. (*Chapman v. California* (1967) 386 U.S. 18, 24 [17 L.Ed.2d 705].)

testimony, fairly read, was that someone told her about appellant's 14 absent days. We assume the statements were hearsay.

Nonetheless, they were substantiated by the attachment which stated that appellant "has been here 29 days and has been absent 14 days since he started attending our school." There was no real dispute as to the authenticity of that report or the accuracy of the statements in it, which were admissible hearsay under the business records and/or official records hearsay exceptions. We note appellant, through his counsel, effectively stipulated at the hearing as to the authenticity of, and the accuracy of the statements made in, that attachment when appellant used the attachment to correct the court's misimpression that there were only 29 school days (of which appellant was absent 14 days) when the attachment in fact reflected there were 29 days that appellant was present in school (and 14 days when he was absent).

The court found true count 2 based in part on the fact that appellant's grades were D's and F's, and none were passing grades. Higgins testified she was informed that appellant received D's in English and physical education, and F's in social studies, computer literacy, math, and science. We assume the information was hearsay.

Nonetheless, the information was substantiated by the progress report signed by Ms. Guzman, appellant's teacher, reflecting that, no later than June 29, 2007, appellant received the above mentioned grades, and it is clear the trial court was concerned with appellant's poor performance. There was and is no real dispute as to the authenticity of that report or the accuracy of Guzman's statements in the report card, which were admissible hearsay under the business records and/or official records hearsay exceptions.

(3) *Count 3.*

The court found true count 3, that appellant used or possessed narcotics, based on the fact that, on May 23, June 18, and July 18, 2007, appellant tested positive for marijuana. Our analysis of this issue in the context of count 1 is equally applicable here.

In light of the above, we conclude that the trial court did not violate appellant's federal due process right to confrontation by permitting Higgins to testify concerning oral hearsay, because any hearsay was reliable and bore a substantial degree of trustworthiness, and there were sufficient indicia of reliability to permit the trial court to conclude that the hearsay was trustworthy.

(b) *None of Appellant's Arguments Compel a Contrary Conclusion.*

Appellant claims *People v. Arreola* (1994) 7 Cal.4th 1144 (*Arreola*), and *In re Kentron D.* (2002) 101 Cal.App.4th 1381 (*Kentron D.*), compel exclusion of Higgins's testimony. *Arreola* held that the admission in evidence, at an adult probation revocation hearing, of a preliminary hearing transcript in lieu of live testimony violated a defendant's right to confrontation and cross-examination guaranteed by federal due process absent unavailability of the witness or other good cause. (*Arreola, supra,* 7 Cal.4th at pp. 1147, 1153-1154.)

Arreola, distinguishing *People v. Maki*, *supra*, 39 Cal.3d 707, in which our Supreme Court upheld the admissibility of a hotel receipt and car rental invoice at a revocation hearing, stated, "There is an evident distinction between a transcript of former *live testimony* and the type of traditional 'documentary' evidence involved in *Maki* that does not have, as its source, live *testimony*. [Citation.] As we observed in [*People v. Winson* (1981) 29 Cal.3d 711], the need for confrontation is particularly important where the evidence is testimonial, because of the opportunity for observation of the witness's demeanor. [Citation.] Generally, the witness's demeanor is not a significant factor in evaluating foundational testimony relating to the admission of evidence such as laboratory reports, invoices, or receipts, where often the purpose of this testimony simply is to authenticate the documentary material, and where the author, signator, or custodian of the document ordinarily would be unable to recall from actual memory information relating to the specific contents of the writing and would rely instead upon the record of his or her own action. [Fn. omitted.]" (*People v. Arreola, supra,* 7 Cal.4th at p. 1157, italics added.) *Maki* did not hold that the admissibility of the documentary evidence

received in evidence in that case depended upon a showing that the declarant of the statements in the document was unavailable.

In *Kentron D., supra*, 101 Cal.App.4th 1381, the People introduced hearsay allegations contained in the counts of an accusatory pleading (a Welfare and Institutions Code section 777 notice) as the sole evidence to prove said allegations at a juvenile probation revocation proceeding instead of presenting live testimony from percipient witnesses. *Kentron D.* concluded the notice was inadmissible hearsay violative of the minor's right to confrontation guaranteed by federal due process where no showing was made that some probation officers who had observed the minor's misconduct were unavailable, and where the People did not call as witnesses other probation officers present in court. (*Kentron D., supra*, 101 Cal.App.4th at pp. 1384, 1387-1388, 1393.)

The present case is not like *Arreola*, in which evidence proffered at a current hearing consisted solely of a transcript of testimony given under oath at a previous hearing, and the testimony was held inadmissible at the current hearing. Nor is this case exactly like *Maki*, in which evidence introduced at a hearing included documentary evidence which was held admissible.

This case is perhaps somewhere in between. In particular, this is a case in which a witness testified as to oral hearsay of declarants whose statements were also recorded in documents not formally introduced into evidence, where the witness essentially had little or no personal knowledge about the matters related in the hearsay. Nonetheless, we believe this case is closer to *Maki* than *Arreola*, and that Higgins's testimony was admissible, where, as here, there was and is no real dispute as to the admissibility of the documents that happened not to be admitted in evidence but which support the reliability of her testimony as to the oral hearsay.

We note the documents were attachments to a notice and probation report which were approved not only by Higgins but by a senior deputy probation officer. Appellant does not dispute that the trial court considered the attachments. We also note the notice, probation report, and attachments were part of a single document. California Rules of Court rule 5.580(e) states, inter alia, that "The court must consider the report prepared by

the probation officer . . . ." The trial court is presumed to have considered the report and therefore its attachments. (Cf. *People v. Black* (2007) 41 Cal.4th 799, 818, fn. 7; Evid. Code, § 664.)

Moreover, the sources of the oral hearsay to which Higgins testified were persons familiar with appellant and who did not misidentify him or mistake his actions for those of someone else. Their jobs required that they be aware of appellant's activities and general behavior. (See *People v. Maki*, *supra* 39 Cal.3d at pp. 715-716.) Higgins was available for cross-examination, and was cross-examined, at the hearing. Nor is this a case like *Kentron D.*, in which the sole evidence against the minor consisted of allegations in the counts of an accusatory pleading. Appellant's reliance on *Arreola* and *Kentron D.* is misplaced.

Appellant claims that, "[i]nformed by *Crawford* [*v. Washington* (2004) 541 U.S. 36 [158 L.Ed.2d 177] (*Crawford*)], the due process right to confrontation should also preclude the admission of testimonial hearsay unless the declarant is unavailable and the probationer had an opportunity to cross-examine the declarant." However, as mentioned, the court in the present case could admit reliable hearsay to the same extent evidence would have been admissible in an adult probation revocation hearing. *Crawford* does not apply to adult probation revocation proceedings. (*People v. Johnson* (2004) 121 Cal.App.4th 1409, 1411; see *In re S.C.* (2006) 138 Cal.App.4th 396, 426-427.)

DISPOSITION

The order continuing wardship is affirmed.

NOT TO BE PUBLISHED IN THE OFFICIAL REPORTS

KITCHING, J.

We concur:

CROSKEY, Acting P. J.

ALDRICH, J.